U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 January 2006

Case No.: 2004-BLA-5562

In the Matter of:

LONNIE BREWER
Claimant

v.

SILVERADO TRUCKING INC.
Employer

KENTUCKY EMPLOYERS MUTUAL INSURANCE
Carrier

and

DIRECTOR,OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES

Edmond Collett, Esquire
For the Claimant

Paul E. Jones, Esquire
For the Employer/Carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the "Act"). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

Mr. Lonnie Brewer, represented by counsel, appeared and testified at the formal hearing held September 1, 2005 in Hazard, Kentucky. I afforded both parties the opportunity to offer testimony, question witnesses and introduce evidence. Thereafter, I closed the record. I based

the following Findings of Fact and Conclusions of Law upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. Although the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformity with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, EX and CX refer to the exhibits of the Director, Employer and Claimant, respectively.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History

Claimant, Lonnie Brewer, filed the instant claim for benefits on July 31, 2002. (DX 1). The District Director denied Claimant benefits on September 16, 2003. (DX 26). Claimant subsequently filed notice contesting the Director's finding and requesting a formal hearing on September 29, 2003. (DX 27). Then on December 31, 2003, the claim was transferred to the Office of Administrative Law Judges. (DX 31).

Factual Background

Claimant was born on April 11, 1941, weighs 240 pounds and is sixty-seven inches tall. (DX 1, Tr. 11). He is married to Mary Rose Brewer. (DX 6; Tr. 11). The couple has one adult child. (DX 1; DX 19). Claimant has an eighth grade education. (Tr. 11; DX 19). He worked the majority of his career in the coal fields as a coal truck driver where he was self employed for many of the years. (Tr. 11-24). Claimant worked in coal mine employment between 1962 and 2001. (Tr. 11-24).

Claimant testified he suffers from shortness of breath, trouble sleeping, productive cough, fatigue and wheezing. (DX 1; DX 19). He is on numerous medications, including Flomex, Accupril, Flouoxetin, Naproxen, Advair, Combivent, oxygen and breathing treatments. (DX 19). Claimant testified he smoked about a pack of cigarettes a week between 1956 and 1986. (Tr. 11-12). However, Dr. Simpao found Claimant smoked a half a pack of cigarettes a day between 1951 and 1986. Dr. Baker noted Claimant smoked one pack of cigarettes per day for twenty years until 1975. Dr. Lockey found Claimant smoked a half to one pack of cigarettes per week for twenty years and Dr. Fino noted Claimant smoked one pack of cigarettes per month for thirty years. I find Claimant smoked a pack of cigarettes a week between 1956 and 1986.

Contested Issues

The parties contest the following issues regarding this claim:

1. Whether the claim was timely filed;

2. The length of Claimant's coal mine employment;

3. Whether Claimant has pneumoconiosis as defined by the Act and the regulations;

4. Whether Claimant's pneumoconiosis, if present, arose out of coal mine employment;

5. Whether Claimant is totally disabled; and

6. Whether Claimant's total disability, if present, is due to pneumoconiosis.

The employer also contests other issues that are identified at line 18(b) on the list of issues. (DX 31). These issues are beyond the authority of an administrative law judge and are preserved for appeal.[1]

Dependency

The Claimant alleges one dependent for the purposes of benefit augmentation, namely his wife, Mary. (DX 1). Claimant and his wife married on October 5, 1962. (DX 6). Accordingly, I find Claimant's wife is a dependent for the purposes of benefit augmentation.

Timeliness

Under Section 725.308(a), a claim of a living miner is timely filed if it is filed "within three years after a medical determination of total disability due to pneumoconiosis" has been communicated to the miner. Section 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. The Employer must rebut this presumption. The record contains no evidence establishing that a physician informed Claimant he was totally disabled due to pneumoconiosis three years prior to the filing of his claim. Therefore, Employer has failed to meet its burden, and I find that this claim was timely filed.

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. The District Director made a finding of twenty-two years in coal mine employment. (DX 26). The documentary evidence includes Claimant's Social Security earnings report and an employment questionnaire. (DX 2-4). Claimant testified to working forty years in coal mine employment between 1962 and 2001. (Tr. 24). During Claimant's testimony he helped to clarify his periods of self employment that were coal mine employment. The Social Security Earnings report reflects the following coal mine employment earnings history:

[1] These issues involve the constitutionality of the Act and the regulations. Administrative Law Judges are precluded from ruling on the constitutionality of the Act; therefore, these issues will not be ruled on herein but are preserved for appeal purposes.

Year	Earnings	Industry Average for 125 days of CME	Years of Coal Mine Employment
1962	$ 1,083.75	$ 2,717.50	0.40
1963	None	$ 2,835.00	0.00
1964	$ 67.25	$ 3,031.25	0.02
1965	None	$ 3,222.50	0.00
1966	None	$ 3,438.75	0.00
1967	None	$ 3,662.50	0.00
1968	$ 95.77	$ 3,801.25	0.03
1969	None	$ 4,261.25	0.00
1970	$ 2,640.80	$ 4,777.50	0.55
1971	$ 7,799.96	$ 5,008.75	1.00
1972	$ 5,625.29	$ 5,576.25	1.00
1973	$ 7,601.00	$ 5,898.75	1.00
1974	$13,200.00	$ 6,080.00	1.00
1975	$ 4,913.57	$ 7,405.00	0.66
1976	$15,109.00	$ 8,008.75	1.00
1977	$ 7,991.00	$ 8,987.50	0.89
1978	$17,700.00	$10,038.75	1.00
1979	$22,900.00	$10,878.75	1.00
1980	$17,543.00	$10,927.50	1.00
1981	$29,700.00	$12,100.00	1.00
1982	$17,213.00	$12,698.75	1.00
1983	$ 1,576.00	$13,720.00	0.11
1984	None	$14,800.00	0.00
1985	None	$15,250.00	0.00
1986	$37,058.00	$15,390.00	1.00
1987	$ 6450.00	$15,750.00	0.40
1988	None	$15,940.00	0.00
1989	$ 7,278.00	$16,250.00	0.45
1990	$ 8,924.00	$16,710.00	0.53
1991	$13,643.00	$17,080.00	0.80
1992	$13,506.00	$17,200.00	0.79
1993	$22,575.00	$17,260.00	1.00
1994	$34,459.00	$17,760.00	1.00
1995	$29,928.00	$18,440.00	1.00
1996	$60,600.00	$18,740.00	1.00
1997	$60,542.00	$19,010.00	1.00
1998	$40,695.00	$19,160.00	1.00
1999	$30,161.50	$19,340.00	1.00
2000	$28,698.00	$19,920.00	1.00[2]
2001	$ 9676.75	$20,518.00	0.47
		Total	25.1 years

[2] Exhibit 610 of the Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual only lists industry averages through 1999. I assumed a three percent increase each year to get the totals for 2000 and 2001.

Accordingly, based upon all the evidence in the record, I find that Claimant was a coal miner, as that term is defined by the Act and Regulations, for twenty-five years. He last worked in the Nation's coal mines in 2001. (DX 1, 4).

Medical Evidence

Medical evidence submitted with a claim for benefits under the Act is subject to the requirement that it must be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See* 20 C.F.R. §§ 718.101 to 718.107. The regulations address the criteria for chest x-rays, pulmonary function tests, physician reports, arterial blood gas studies, autopsies, biopsies and "other medical evidence." *Id.* "Substantial compliance" with the applicable regulations entitles medical evidence to probative weight as valid evidence.

Secondly, medical evidence must comply with the limitations placed upon the development of medical evidence. 20 C.F.R. § 725.414. The regulations provide that a party is limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy and two medical reports as affirmative proof of their entitlement to benefits under the Act. §§ 725.414(a)(2)(i), 725.414 (a)(3)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports and physician opinions that appear in one single medical report must comply individually with the evidentiary limitations. *Id.* In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary function test or arterial blood gas study. §§ 725.414(a)(2)(ii), 725.414(a)(3)(ii). Likewise, the District Director is subject to identical limitations on affirmative and rebuttal evidence. § 725.414(a)(3)(i-iii).

A. X-ray Reports[3]

Exhibit	Date of X-ray	Physician/Qualifications	Interpretation	Quality
DX 12	6/22/02	Baker B-reader	1/0	2
DX 13	6/22/02	Wheeler B/BCR	Negative	3
DX 10	9/24/02	Simpao none	1/1	1
DX 15	9/24/02	Wheeler B/BCR	Negative	2
DX 14	10/31/02[4]	Lockey B-reader	Negative	1
EX 1	4/24/03	Fino B-reader	Negative	1

[3] A chest x-ray may indicate the presence or absence of pneumoconiosis. 20 C.F.R. § 718.102(a) and (b). It is not utilized to determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease.

[4] Employer provided a re-reading of the October 31, 2002 x-ray by Dr. Wiot. However, use of this re-reading would exceed Employer's evidence limitations and therefore, I will not take Dr. Wiot's reading into consideration. *See* 20 C.F.R. § 725.414(a)(2)(i) and (3)(i).

B. Pulmonary Function Studies[5]

Exhibit/ Date of exam	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1 / FVC	Tracings	Comments
DX 12 6/22/02	Baker	61/ 68"	3.10	3.99	N/A	78	Yes	None
DX 10 9/24/02	Simpao	61/ 66"	2.71	3.73	79	73	Yes	Good Cooperation and understanding
DX 14 10/31/02	Lockey	61/ 67"	3.16	4.08	N/A	77.5	Yes	None
EX 1 4/24/03	Fino	62/ 66.5"	3.02	4.00	N/A	76	Yes	None[6]

C. Blood Gas Studies[7]

Exhibit	Date of Exam	Physician	pCO_2	pO_2	Resting/ Exercise
DX 12	6/22/02	Baker	41	76	R[8]
DX 10	9/24/02	Simpao	38.5	99.1	R
DX 14	10/31/02	Lockey	39	69	R[9]
EX 1	4/24/03	Fino	39.6	83.1	R[10]

[5] The pulmonary function study, also referred to as a ventilatory study or spirometry, indicates the presence or absence of a respiratory or pulmonary impairment. 20 C.F.R. § 718.104(c). The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Benefits Review Board (the "Board") has held that a ventilatory study which is accompanied by only two tracings is in substantial compliance with the quality standards at § 718.204(c)(1). *Defore v. Alabama By-Products Corp*., 12 B.L.R. 1-27 (1988). The values from the FEV_1 as well as the MVV or FVC must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

[6] Drs. Baker, Lockey and Fino fail to state the cooperation and understanding level of Claimant when their pulmonary function tests were administered. Although the tests fail to meet regulation requirements, in *Crapp v. U.S.Steel Corp.*, 6 B.L.R. 1-476 (1983), the Board held that a non-conforming pulmonary function study may be entitled to probative value where the results exceed the table values, *i.e.*, the test is non-qualifying. Therefore, I will take the studies into consideration.

[7] Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. 20 C.F.R. § 718.105(a).

[8] Although Dr. Baker discusses his arterial blood gas study results in his report, the actual study is not in evidence. Therefore, I cannot consider the results.

[9] Dr. Lockey's October 31, 2002 arterial blood gas studies fail to identify the altitude at which the test was administered. Therefore, the studies do not meet regulation requirements and I will not consider the results. *See* 20 C.F.R. § 718.105(c)(2).

[10] Dr. Fino's April 24, 2003 arterial blood gas studies fail to identify the altitude at which the test was administered. Therefore, the studies do not meet regulation requirements and I will not consider the results. *See* 20 C.F.R. § 718.105(c)(2).

D. Narrative Medical Evidence

Valentino Simpao, M.D., Board-certified in Internal Medicine and Pulmonary Diseases, examined Claimant on September 24, 2002, at which time he took a patient history of symptoms and recorded an employment history of thirty-four years as a coal truck driver. (DX 10). Dr. Simpao noted Claimant had a history of frequent colds (ten years), wheezing attacks (ten years), chronic bronchitis (two years), arthritis (twenty years), heart disease, allergies and high blood pressure . He recorded a smoking history of half a pack of cigarettes per day between 1951 and 1986. Claimant's symptoms included sputum (brown secretions daily for two or three years), wheezing (two or three years), dyspnea (daily upon exertion and at rest, two or three years), cough (two or three years), orthopnea (two or three years), paroxysma nocturnal dyspnea (two or three years). In addition, Dr. Simpao performed a chest x-ray, pulmonary function tests, arterial blood gas studies, EKG and physical examination of Claimant. Upon palpation, Dr. Simpao found tactile fremitus, increased right over left. At percussion he found increased resonance in the upper chest and axillary areas. Then upon auscultation he found crepitations with occasional forced expiratory wheezes. After reviewing the results of the examination and tests, Dr. Simpao diagnosed Claimant with coal workers' pneumoconiosis. Dr. Simpao based his opinion on Claimant's coal dust exposure. In Dr. Simpao's opinion, Claimant has a mild impairment rating. (DX 10).

Dr. Simpao submitted a supplemental medical report on July 12, 2005. (DX 34). Dr. Simpao diagnosed Claimant with pneumoconiosis based on Claimant's chest x-ray, symptomology (productive cough with half cup sputum daily, wheezing, dyspnea at rest and exertion, orthopnea and paroxysmal nocturnal dyspnea) and the physical findings on examination (crepitations, slightly distant breath sounds with expiratory wheeze with auscultation of lungs, slightly plethoric face, slightly cyanotic lips and nails). Dr. Simpao opined Claimant has a mild pulmonary impairment as the result of his coal dust exposure. Dr. Simpao did not state a basis for his opinion. He also found Claimant totally disabled due to a combination of Claimant's pulmonary impairment, heart disease and back problems. However, Dr. Simpao acknowledged Claimant's smoking history and heart disease could have aggravated Claimant's pulmonary condition and he is unable to determine the degree each factor contributed to the impairment. (DX 34).

Glenn Ray Baker, Jr., M.D., Board-certified in Internal Medicine and Pulmonary Diseases, examined Claimant on June 22, 2002, at which time he took a patient history of symptoms and recorded an employment history of forty to forty-one years as a coal truck driver. (DX 12). Dr. Baker noted Claimant's symptoms included cough, sputum production, wheezing and shortness of breath. Dr. Baker noted Claimant smoked one pack of cigarettes a day for twenty years until 1975. Dr. Baker performed a chest x-ray, pulmonary function tests, arterial blood gas studies and physical examination on Claimant. Upon physical examination Claimant's lungs were clear with no rales or wheezes. Dr. Baker noted Claimant's extremities showed no clubbing, cyanosis or edema. (DX 12).

Upon reviewing the results of the examination and tests, Dr. Baker diagnosed Claimant with coal workers' pneumoconiosis 1/0 based on Claimant's chest x-ray and coal dust exposure.

He found mild to moderate resting arterial hypoxemia based on his arterial blood gas analysis.[11] Dr. Baker also diagnosed Claimant with chronic bronchitis based on his history. In Dr. Baker's opinion, Claimant has a class one impairment due to his FEV_1 and vital capacity being greater than eighty percent predicted. Dr. Baker also found Claimant is 100% disabled based on the presence of pneumoconiosis and section 5.8, page 106, chapter five of *Guides to the Evaluation of Permanent Impairment*, Fifth Edition; stating persons who develop pneumoconiosis should limit further exposure to the offending agent. Dr. Baker attributed Claimant's pulmonary impairment at least in part to coal dust exposure. He acknowledged Claimant's smoking history could also be a cause of the impairment. (DX 12).

In addition, the record includes a deposition of Dr. Baker taken on December 12, 2003. (DX 16). Dr. Baker reiterated the findings in his report and further testified that he opined Claimant suffered from pneumoconiosis based on an abnormal chest x-ray and coal dust exposure. However, Dr. Baker stated when he examined Claimant he found no abnormalities when listening to Claimant's chest and the physical exam did not substantiate Claimant's subjective complaints of shortness of breath. Dr. Baker also opined Claimant suffers from a minimal pulmonary impairment. He states in regard to actual respiratory and functional ability, Claimant has the ability to perform his regular coal mine employment but that he is occupationally disabled due to the presence of pneumoconiosis and section 5.8, page 106, chapter five of *Guides to the Evaluation of Permanent Impairment*, Fifth Edition; stating persons who develop pneumoconiosis should limit further exposure to the offending agent. (CX 16).

James Chaney, M.D., is Claimant's treating physician. He submitted a medical report on August 8, 2002. He diagnosed Claimant with pneumoconiosis. Dr. Chaney identified a February 15, 2002 pulmonary function test and pneumoconiosis as a basis of Claimant's medical impairments. Dr. Chaney noted Claimant's symptoms as shortness of breath, orthopnea, wheezing, rhonci, edema, fatigue, palpitations and coughing. He opined Claimant suffers from a pulmonary disease that was caused at least in part by coal dust exposure. He based his opinion on Claimant's coal dust exposure.[12] Dr. Chaney also found Claimant suffers from a pulmonary impairment related to pneumoconiosis. He based his opinion on Claimant's symptoms.

James E. Lockey, M.D., Board-certified in Internal Medicine, Pulmonary Diseases and Occupational Medicine, examined Claimant on October 31, 2002, at which time he reviewed the Claimant's symptoms and recorded an occupational history as a coal truck driver for forty years. (DX 14). Dr. Lockey stated Claimant was self employed for thirty years and then worked for other companies. Claimant drove a coal truck from the deep and strip mines to the tipples. He left coal mine employment when he was laid off. Dr. Lockey stated Claimant smoked a half to one pack of cigarettes per week for twenty years for a two to three pack year history. Claimant quit smoking in 1986. Dr. Lockey took a history of Claimant's symptoms revealing progressive shortness of breath, daily cough (three to four years), sputum, nocturnal wheezing (three to four years), possible sleep apnea, obesity and paroxysmal nocturnal dyspnea. Dr. Lockey performed a chest x-ray, pulmonary function tests, arterial blood gas studies[13] and physical examination on Claimant. Upon physical examination Claimant's chest was clear to auscultation with no rales,

[11] As stated above, Dr. Baker's arterial blood gas study is not within the record and it will not be considered.
[12] Dr. Chaney identifies another reasoning for his diagnosis but it is illegible.
[13] As stated above, Dr. Lockey's arterial blood gas study did not conform to regulation requirements and it will not be taken into consideration.

rhonchi or wheezes noted. Claimant's extremities revealed +1 edema but no clubbing or cyanosis. (DX 14).

Dr. Lockey opined Claimant does not suffer from pneumoconiosis or any other respiratory disease. Dr. Lockey based his opinion on Claimant's negative chest x-ray and pulmonary function tests. He noted Claimant's chest x-ray does not demonstrate any changes consistent with pneumoconiosis and his pulmonary function parameters are completely within the normal limits. He found no evidence of any type of occupational pulmonary disorder. Dr. Lockey stated from a pulmonary perspective Claimant is medically able to perform his regular coal mine employment. He noted Claimant suffers from no chronic obstructive pulmonary disease or respiratory impairment. Dr. Lockey based his opinion on Claimant's negative chest x-ray and normal pulmonary function tests and arterial blood gas studies. (DX 14).

Dr. Lockey provided a supplemental report on March 27, 2003. (DX 18). Dr. Lockey reviewed the other medical evidence in the record. He noted that the medical record does not support a finding of pneumoconiosis. Dr. Lockey stated the majority of chest x-ray evidence does not report changes consistent with pneumoconiosis and the CT and HRCT scans do not support pneumoconiosis. He also noted the pulmonary function tests in the record are all normal. As a result, he stated his opinion remained the same as in his October 31, 2002 report. (DX 18).

In addition, the record includes a deposition of Dr. Lockey taken on April 1, 2003. (DX 17). Dr. Lockey reiterated the findings in his report and further testified that he opined Claimant does not suffer from pneumoconiosis based on his complete evaluation of Claimant. He acknowledged Claimant's chest x-ray revealed some blunting of the left costophrenic angle which usually indicates changes consistent with a previous inflammatory abnormality such as pneumonia but stated these changes are not related to coal dust exposure. Dr. Lockey testified that based on the pulmonary function tests in the record, Claimant does not suffer from a total disabling pulmonary or respiratory impairment and retains the capacity to return to his ordinary coal mine employment. (DX 17).

Gregory J. Fino, M.D., Board-certified in Internal Medicine and Pulmonary Diseases, examined Claimant on April 24, 2003 and issued a medical report on Claimant's condition on May 7, 2003. (EX 1). Dr. Fino reviewed Claimant's symptoms and recorded an employment history of forty years as a coal truck driver. He found that Claimant smoked one pack of cigarettes per month for thirty years. Dr. Fino recorded Claimant had a history of heart disease, frequent colds, back pain headaches, muscle problems and breathing problems. At the time of the evaluation, Claimant complained of shortness of breath (ten years), dyspnea upon exertion, chest pain, cough, sputum production and wheezing. He reported no orthopnea or paroxysmal nocturnal dyspnea. Upon physical examination, Dr. Fino found Claimant an obese man with clear lung sounds to auscultation and percussion without wheezes, rales or rhonchi. Dr. Fino performed a chest x-ray, pulmonary function tests and arterial blood gas studies on Claimant. (EX 2).

Dr. Fino opined Claimant does not suffer from pneumoconiosis based on a negative chest x-ray reading, normal spirometry evaluations, normal diffusing capacity and a normal total lung capacity. Dr. Fino noted Claimant's total lung capacity was not reduced, which rules out the presence of restrictive lung disease. He found no significant pulmonary fibrosis. In addition, Dr.

Fino opined from a functional standpoint Claimant's pulmonary system is normal. Dr. Fino notes Claimant retains the capacity to perform his regular coal mine employment even assuming he is required to perform heavy labor. Dr. Fino based his opinion on Claimant's normal spirometry showing no evidence of obstruction, restriction or ventilatory impairment. He notes Claimant's normal diffusing capacity rules out the presence of an impairment in oxygen transfer.[14] (EX 1).

In addition, the record includes a deposition of Dr. Fino taken on January 31, 2005. (EX 2). Dr. Fino reiterated the findings in his report and further testified that he opined Claimant does not suffer from pneumoconiosis or a pulmonary impairment. Dr. Fino testified Claimant retains the capacity to return to his ordinary coal mine employment. (EX 2).

E. Hospital Records and Treatment Notes

The amended regulations provide that, notwithstanding the evidentiary limitations contained at 20 C.F.R. § 725.414(a)(2) and (a)(3), "any record of a miner's hospitalization for respiratory or pulmonary or related disease may be received into evidence." 20 C.F.R. § 725.414 (a)(4). Furthermore, a party may submit other medical evidence reported by a physician and not specifically addressed under the regulations under Section 718.107, such as a CT scan.

Claimant submitted medical records of his treatment with Dr. Chaney between 1996 and 2002. (DX 8). Throughout the records, Dr. Chaney notes Claimant suffers from chronic obstructive pulmonary disease and bronchitis. The records include numerous chest x-ray reports and examinations finding chronic obstructive pulmonary disease.

On September 13, 1996 Claimant saw Dr. Chaney for Prostatitis. Dr. Chaney examined Claimant's chest and noted equal and bilateral expansion and Claimant's lungs were clear to auscultation and percussion. However, decreased breath sounds were noted.

On August 13, 1997 Claimant saw Dr. Chaney for abdominal pain. Dr. Chaney performed a CT scan of Claimant's abdomen which was negative.

Claimant was diagnosed with bronchitis on January 20, 1998. Claimant's symptoms included coughing, congestion and sputum. Claimant's chest examination revealed equal and bilateral expansion, good excursion of the diaphragms, clear lungs to auscultation and percussion with some occasional wheezes and harsh breath sounds.

A CT Scan of Claimant's chest was performed on March 20, 2000. CT showed left pleural base nodular thickening. Chest exam showed equal and bilateral expansion, good excursion of the diaphragms, clear lungs to auscultation and percussion and decreased breath sounds. The chest x-ray revealed mild chronic pulmonary disease and left pleural effusion with a blunting angle.

On April 5, 2001 the x-ray report notes chronic pulmonary disease with no evidence of infiltrate, congestion, pleural effusion or pneumothorax.

[14] Dr. Fino also discusses the findings from his arterial blood gas study; however, as stated above, it did not conform to regulation requirements and will not be given weight.

The November 1, 2001 exam notes blunting of the costophrenic angle on the left. The right lung was clear with no evidence of pleural effusion or pneumothorax.

On February 7, 2002 Claimant presented to Dr. Chaney with history of coughing up yellowish phlegm. Pulmonary function tests were administered but the tests were non-qualifying. Claimant's chest exam revealed equal and bilateral expansion, some wheezes and hard breath sounds throughout. His chest wall was without deformities and not tender to palpitation. Dr. Chaney diagnosed Claimant with bronchitis.

After a diagnosis of chronic obstructive pulmonary disease.,Claimant saw Dr. Chaney for a follow up visit on July 25, 2002. Upon examination, Dr. Chaney noted no more shortness of breath than normal; no sputum, chest pain or edema. He stated that Claimant is obese and that the chest exam revealed equal and bilateral expansion. On auscultation, lungs fields were clear with no wheezes and at percussion lung fields were resonate. Chest wall was emphysematous.

Throughout the treatment records Dr. Chaney never attributes Claimant's respiratory problems to coal dust exposure.

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, Claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. § 725.202(d)(2)(i-iv). Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989).

Pneumoconiosis and Causation

Section 718.202 provides four means by which pneumoconiosis may be established: chest x-ray, biopsy or autopsy, presumption under §§ 718.304, 718.305 or 718.306, or if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. 20 C.F.R. § 718.202(a). The regulatory provisions at 20 C.F.R. § 718.201 contain a definition of "pneumoconiosis" provided as follows:

> (a) For the purposes of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical," pneumoconiosis and statutory, or "legal," pneumoconiosis.
>
> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs

> and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
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> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

§ 718.201(a).

It is within the administrative law judge's discretion to determine whether a physician's conclusions regarding pneumoconiosis are adequately supported by documentation. *Lucostic v. United States Steel Corp*., 8 B.L.R. 1-46, 1-47 (1985). "An administrative law judge may properly consider objective data offered as documentation and credit those opinions that are adequately supported by such data over those that are not." *See King v. Consolidation Coal Co*., 8 B.L.R. 1-262, 1-265 (1985).

A. X-ray Evidence

Under section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP,* 12 B.L.R. 1-6 (1988); *Clark*, 12 B.L.R. 1-149 (1989).

The chest x-rays in the record do not support a finding of pneumoconiosis. Dr. Simpao found the September 24, 2002 x-ray film positive for pneumoconiosis; however, the x-ray was re-read as negative by Dr. Wheeler, a Board-certified radiologist and B-reader. Although Dr. Wheeler marked the film quality a "three," he was still able to interpret the film. As such, I find this x-ray negative. Dr. Baker, a B-reader, found the June 22, 2002 x-ray film positive for pneumoconiosis; however, the x-ray was re-read as negative by Dr. Wheeler, a Board-certified radiologist and B-reader. Therefore, I find the x-ray negative. Dr. Lockey, a B-reader, found the October 31, 2002 x-ray film negative and Dr. Fino, a B-reader, found the April 24, 2003 x-ray film negative. Accordingly, I find the preponderance of negative x-ray readings outweigh the positive readings. Therefore, pneumoconiosis has not been established under § 781.202(a)(1).

B. Autopsy/Biopsy

Pursuant to Section 718.202(a)(2), a claimant may establish the existence of pneumoconiosis by biopsy or autopsy evidence. As no biopsy or autopsy evidence exists in the record, this section is inapplicable in this case.

C. Presumptions

Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions described in Sections 718.304, 718.305, or 718.306 are applicable. Section 718.304 is not applicable in this case because there is no evidence of complicated pneumoconiosis. Section 718.305 does not apply because it pertains only to claims that were filed before January 1, 1982. Finally, Section 718.306 is not relevant because it is only applicable to claims of miners who died on or before March 1, 1978.

D. Medical Opinions

Section 718.202(a)(4) provides another way for a claimant to prove that he has pneumoconiosis. Under section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion might support the presence of the disease if it is supported by adequate rationale, not withstanding a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 9 B.L.R. 1-22, 1-24 (1986). The weight given to a medical opinion will be in proportion to its well-documented and well-reasoned conclusions.

A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 B.L.R. 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984); *Buffalo v. Director*, OWCP, 6 B.L.R. 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 B.L.R. 1-130 (1979).

A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*).

Dr. Simpao's reports conclude Claimant suffers from pneumoconiosis. (DX 10, 34). He bases his opinion on Claimant's coal dust exposure, chest x-ray, symptomology (productive cough with half cup sputum daily, wheezing, dyspnea at rest and exertion, orthopnea and paroxysmal nocturnal dyspnea) and the physical findings on examination (crepitations, slightly distant breath sounds with expiratory wheeze with auscultation of lungs, slightly plethoric face, slightly cyanotic lips and nails). Although, Dr. Simpao relies on a chest x-ray interpreted as negative for the existence of pneumoconiosis by a more qualified physician, his report states

specific reasoning and documentation for his diagnosis. Therefore, I find Dr. Simpao's report as to pneumoconiosis well reasoned and documented.

Dr. Baker also opined Claimant has pneumoconiosis. However, Dr. Baker opined Claimant has pneumoconiosis based solely upon his own readings of a chest x-ray and Claimant's history of dust exposure. (DX 8). In *Cornett v. Benham Coal Inc.*, 227 F.3d 569 (6th Cir. 2000), the Sixth Circuit Court of Appeals intimated that such bases alone do not constitute sound medical judgment under Section 718.202(a)(4). *Id.* at 576. The Board has also held permissible the discrediting of physician opinions amounting to no more than x-ray reading restatements. *See Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993)(*citing Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113 (1989), and *Taylor v. Brown Badgett, Inc.*, 8 B.L.R. 1-405 (1985)). In *Taylor*, the Board explained that the fact that a miner worked for a certain period of time in the coal mines alone does not tend to establish that he has any respiratory disease arising out of coal mine employment. *Taylor*, 8 B.L.R. at 1-407. The Board went on to state that, when a doctor relies solely on a chest x-ray and a coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his or her opinion "merely a reading of an x-ray... and not a reasoned medical opinion." *Id*.

Acknowledging that Dr. Baker performed other physical and objective testing, he listed that he expressly relied on Claimant's positive chest x-ray and coal dust exposure for his clinical determination of pneumoconiosis. Moreover, he failed to state how the results from his other objective testing might have impacted his diagnosis of pneumoconiosis. In his deposition, Dr. Baker even stated that during his physical examination when he listened to Claimant's chest he found no abnormalities and that the exam did not substantiate Claimant's subjective complaints of shortness of breath. (DX 16). As Dr. Baker does not indicate any other reasons for his diagnosis of pneumoconiosis beyond the chest x-ray and exposure history, I find his report with respect to a diagnosis of clinical pneumoconiosis is unreasoned and I afford it little weight.

Dr. Baker also diagnosed Claimant with chronic bronchitis based on history. However, Dr. Baker does not attribute Claimant's chronic bronchitis to coal dust exposure. Although in Dr. Baker's report he states within a reasonable medical probability that Claimant's disease is the result of coal dust exposure, he only bases this opinion on the chest x-ray showing evidence of pneumoconiosis. He never attributes coal dust exposure as a cause of Claimant's chronic bronchitis. Even if he had attributed coal dust exposure to Claimant's chronic bronchitis, Dr. Baker fails to provide reasoning and documentation to support the chronic bronchitis diag-nosis. Therefore, I find Dr. Baker's report with respect to a diagnosis of legal pneumoconiosis unreasoned and I afford it little weight.

Dr. Chaney opined Claimant has pneumoconiosis. (DX 9). However, Dr. Chaney does not provide a basis for his diagnosis. Dr. Chaney notes a February 15, 2002 pulmonary function test as a basis for Claimant's impairments but also notes pneumoconiosis in the same section. He provides no explanation for his findings. He checks that Claimant has a pulmonary disease caused by coal dust exposure but bases this diagnosis only on Claimant's coal dust exposure. Dr. Chaney also notes the symptoms Claimant suffers from but fails to describe how these symptoms relate his diagnosis of pneumoconiosis. Therefore, I find Dr. Chaney's diagnosis of pneumoconiosis unreasoned and undocumented.

Claimant also submitted medical records from Dr. Chaney's office. (DX 8). Throughout the records Dr. Chaney diagnosed Claimant as suffering from chronic obstructive pulmonary disease and bronchitis. However, in the medical records Dr. Chaney never attributes Claimant's chronic obstructive pulmonary disease or bronchitis to coal dust exposure. Therefore, I find the medical records do not support a finding of legal pneumoconiosis.

In contrast, Dr. Lockey's report concluded Claimant does not have pneumoconiosis. (DX 14, 17, 18). To support his opinion, Dr. Lockey notes Claimant's chest x-ray revealed no changes consistent with pneumoconiosis and his pulmonary function parameters are completely within the normal limits. Dr. Lockey stated he found no evidence of any type of occupational pulmonary disorder. In Dr. Lockey's supplemental report he took into consideration the other medical evidence in the record and based on the evidence came to the same conclusion. Dr. Lockey's opinions are consistent with the probative chest x-ray evidence of record. He further explained his findings in his April 1, 2003 deposition. I find Dr. Lockey's medical report is well-reasoned and well-documented regarding pneumoconiosis.

Dr. Fino also opined Claimant does not have pneumoconiosis. (EX 1). Dr. Fino bases his opinion on a negative chest x-ray reading, normal spirometry evaluations, normal diffusing capacity and a normal total lung capacity. Dr. Fino noted Claimant's total lung capacity was not reduced which rules out the presence of restrictive lung disease. He found no significant pulmonary fibrosis. Dr. Fino's opinions are consistent with the probative chest x-ray evidence of record. Dr. Fino further explains his findings and reasoning in his January 31, 2005 deposition. (EX 2). He states in his deposition that Claimant's physical examination revealed no lung abnormalities and the exam did not substantiate Claimant's complaints of shortness of breath. I find Dr. Fino's medical report is well-reasoned and well-documented regarding pneumoconiosis.

I have considered all the evidence under Section 718.202(a); and I find the probative negative x-ray reports and the more complete, comprehensive and better supported medical opinion reports of Drs. Lockey and Fino outweigh the unreasoned reports of Drs. Baker and Chaney and the other contrary evidence of record. Although Dr. Simpao's report was well-reasoned and documented, Claimant must prove pneumoconiosis by a preponderance of the evidence. Thus, I find Claimant has failed to demonstrate, by a preponderance of the evidence, the existence of pneumoconiosis.

Causation of Pneumoconiosis

Once it is determined that a claimant suffers from pneumoconiosis, it must be determined whether the claimant's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). The burden is upon Claimant to demonstrate by a preponderance of the evidence that his/her pneumoconiosis arose out of his coal mine employment.
20 C.F.R. § 718.203(b) provides:

> If a miner who is suffering or has suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment.

Id.

Since I have found that Claimant failed to prove that he has pneumoconiosis, the issue of whether pneumoconiosis arose out of his employment in the coal mines is moot.

Total Disability

The determination of the existence of a totally disabling respiratory or pulmonary impairment shall be made under the provisions of Section 718.204. A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 B.L.R. 1-11, 1-15 (1991). A claimant can be considered totally disabled if the irrebuttable presumption of Section 718.304 applies to his claim. If, as in this case, the irrebuttable presumption does not apply, a miner shall be considered totally disabled if in absence of contrary probative evidence, the evidence meets one of the Section 718.204(b)(2) standards for total disability. The regulation at Section 718.204(b)(2) provides the following criteria to be applied in determining total disability: 1) pulmonary function studies; 2) arterial blood gas tests; 3) a cor pulmonale diagnosis; and/or, 4) a well-reasoned and well-documented medical opinion concluding total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1987).

A. Pulmonary Function Tests

Under Section 718.204(b)(2)(i) total disability may be established with qualifying pulmonary function tests.[15] To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited poor cooperation or comprehension. *See, e.g., Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984).

In the pulmonary function tests of record, there is a small discrepancy in the height attributed to Claimant. The fact-finder must resolve conflicting heights of the miner recorded on

[15]A qualifying pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A non-qualifying test produces results that exceed the table values.

the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1- 221 (1983). *See also Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995). In analyzing the pulmonary function test results, I shall utilize the average height reported for Claimant, 66.9 inches.

All the pulmonary function tests of record produced non-qualifying values. Accordingly, I find per Section 178.204(b)(2)(i), Claimant has failed to establish total disability.

B. Blood Gas Studies

Under Section 718.204(b)(2)(ii) total disability may be established with qualifying arterial blood gas studies. All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner or circumstances surrounding the testing affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated).

There is only one arterial blood gas study of record following regulation requirements. However, the study produced non-qualifying values. Accordingly, I find Claimant has not proven total disability under Section 718.204(b)(2)(ii).

C. Cor Pulmonale

There is no medical evidence of cor pulmonale in the record; therefore, I find Claimant failed to establish total disability with medical evidence of cor pulmonale under the provisions of Section 718.204(b)(2)(iii).

D. Medical Opinions

The final way to establish a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2) is with a reasoned medical opinion. The opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. *Id*. A claimant must demonstrate that his respiratory or pulmonary condition prevents him from engaging in his "usual" coal mine employment or comparable and gainful employment.
20 C.F.R. § 718.204(b)(2)(iv).

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. In assessing total disability under Section 718.204(b)(2)(iv), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Budash v. Bethlehem Mines Corp.*, 9 B.L.R. 1-48, 1-51 (holding medical report need only describe either severity of impairment or physical effects imposed by claimant's respiratory impairment sufficiently for administrative law judge to infer that claimant is totally disabled). Once it is demonstrated that the miner is unable to perform his or her usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears

the burden of going forth with evidence to demonstrate that the miner is able to perform comparable and gainful work pursuant to Section 718.204(c)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

The physicians' reports are set forth above. In summary, Dr. Simpao performed an employment history upon Claimant finding he worked as a coal truck driver for thirty four years. (DX 10). Dr. Simpao states Claimant has a mild pulmonary impairment as a result of his many years of coal dust exposure. (DX 10, 34). Dr. Simpao opines Claimant is totally disabled due to the combination of his pulmonary status, heart condition and back problems. Dr. Simpao failed to provide a basis for his conclusion. He fails to state how his objective testing and examination of Claimant support his findings. Furthermore, Dr. Simpao's opinion is not supported by the objective medical evidence in the record. Therefore, Dr. Simpao's diagnosis regarding total disability is unreasoned and undocumented and I afford it little weight.[16]

A medical opinion does not have to be wholly reliable or wholly unreliable; rather, the opinion can be divided into the relevant issues of entitlement to determine whether it is reasoned and documented with regard to any particular issue. *See Drummond Coal Co. v. Freeman*, 17 F.3d 361 (11th Cir. 1994); *Billings v. Harlan #4 Coal Co.*, B.R.B. No. 94-3721 B.L.A. (June 19, 1997) (*en banc) (*unpub.). Accordingly, I divide Dr. Simpao's opinions into the relevant issues of pneumoconiosis and total disability. (DX 10, 34). As noted above with respect to pneumoconiosis, Dr. Simpao's report is well-reasoned and well-documented. However, in examining the second issue of total disability, Dr. Simpao fails to state a basis for his opinion.

Dr. Baker performed an employment history upon Claimant finding he worked as a coal truck driver between forty and forty-one years. (DX 12). Dr. Baker opined Claimant has a class one impairment due to his FEV_1 and vital capacity being greater than eighty percent predicted. Dr. Baker also found Claimant is 100% disabled based on the presence of pneumoconiosis and section 5.8, page 106, chapter five of *Guides to the Evaluation of Permanent Impairment*, Fifth Edition; stating persons who develop pneumoconiosis should limit further exposure to the offending agent. An opinion of the inadvisability of returning to coal mine employment because of pneumoconiosis is not the equivalent of a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.,* 12 BLR 1-83 (1988). As such, I assign little weight to Dr. Baker's finding of total disability.

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[16] Complete Pulmonary Evaluation

The District Director is required to provide each miner applying for benefits with the "opportunity to undergo a complete pulmonary evaluation at no expense to the miner." § 725.406(a). A complete evaluation includes a report of the physical examination, a chest x-ray, a pulmonary function study, and an arterial blood gas study. Reviewing courts have added to this burden by requiring the pulmonary evaluation be sufficient to constitute an opportunity to substantiate a claim for benefits. *See Petry v. Director*, OWCP 14 B.L.R. 1-98, 1-100 (1990)(*en banc*); *see also Newman v. Director*, OWCP, 745 F.2d 1161 (8th Cir. 1984); *Prokes v. Mathews*, 559 F.2d 1057, 1063 (6th Cir. 1977).

In this Decision and Order, I have found that Claimant's complete pulmonary evaluation by Dr. Simpao is unreasoned for purposes of determining total disability. However, even if this claim were remanded to the Director to provide a reasoned and documented opinion concerning the existence of total disability, the Claimant could not prevail. Claimant could still not meet his preponderance of the evidence. Therefore, I find that remand of this case would be futile. *Larioni v. Director, OWCP*, 6 B.L.R. 1-1276 (1984); *see*, *e.g.*, *Mullins v. Director, OWCP*, No. 05-0295 BLA (BRB, Jul. 27, 2005)(unpub.); *Bowling v. Director, OWCP,* No. 05-0327 BLA (BRB, Jul. 29, 2005)(unpub.).

Dr. Chaney opined Claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. He bases his opinion on Claimant's symptoms (shortness of breath, orthopnea, chest tightness, wheezing, rhonci, edema, fatigue, palpitations and coughing). Dr. Chaney fails to explain how these symptoms contribute to Claimant's disability. Also he does not state whether these are symptoms he found as a result of an examination or whether they were gathered subjectively from Claimant. When asked to identify the findings that show Claimant's medical impairments Dr. Chaney cites to a February 15, 2002 pulmonary function test, however the test is not qualifying. He also cites to Claimant's pneumoconiosis and a chest x-ray but does not identify the results. Dr. Chaney fails to explain how his treatment and objective testing of Claimant contributed to his opinion. I find Dr. Chaney's opinion regarding total disability unreasoned and I afford it little weight.

In contrast, Dr. Lockey opines Claimant does not have a pulmonary or respiratory impairment. (DX 14,17,18). He states there is no evidence of a disabling respiratory impairment. He bases his opinion on the pulmonary function tests of record. Dr. Lockey took into consideration the findings of other physicians on examination testing. Dr. Lockey's opinion is consistent with the probative pulmonary function tests of record. Dr. Lockey further explained his findings and opinions in his deposition dated April 1, 2003 and supplemental opinion dated March 27, 2003. (EX 17-18). I find Dr. Lockey's medical report is well-reasoned and well-documented regarding total disability.

Dr. Fino also opines Claimant does not suffer from a respiratory impairment. Dr. Fino stated from a functional standpoint Claimant's pulmonary system is normal. (EX 1). He notes Claimant retains the capacity to perform his regular coal mine employment even assuming he is required to perform heavy labor. Dr. Fino based his opinion on Claimant's normal spirometry showing no evidence of obstruction, restriction or ventilatory impairment. He notes Claimant's normal diffusing capacity rules out the presence of an impairment in oxygen transfer. The objective medical testing of record supports Dr. Fino's findings. Dr. Fino further explained his findings and opinions in his deposition taken on January 31, 2005. (EX 2). I find Dr. Fino's medical report is well-reasoned and well-documented regarding total disability.

I have considered all the medical reports and I find the more complete, comprehensive and better supported medical opinion reports of Drs. Lockey and Fino outweigh the unreasoned reports of Drs. Simpao, Baker and Chaney. Thus, I find Claimant has not established total disability by the probative medical opinion reports of record under the provisions of Subsection 718.204(b)(2)(iv).

E. Overall Total Disability Finding

Upon consideration of all of the evidence of record, Claimant has not established, by a preponderance of the evidence, total disability. Accordingly, I find Claimant has not established total disability under the provisions of Section 718.204(b).

Total Disability Due to Pneumoconiosis

Since I have found Claimant failed to prove total disability, the issue of whether total disability is due to pneumoconiosis is moot.

ENTITLEMENT

Based on the findings in this case, Claimant has not met the conditions of entitlement. Claimant has not established the presence of pneumoconiosis, that such pneumoconiosis arose out of coal mine employment or that he is totally disabled. Therefore, Mr. Brewer's claim for benefits under the Act shall be denied.

Attorney's Fees

The award of attorney's fees, under this Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim

ORDER

It is ordered that the claim of Lonnie Brewer for benefits under the Black Lung Benefits Act is hereby DENIED.

A

JOSEPH E. KANE
Administrative Law Judge

Notice of Appeal Rights: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with Board within thirty (30) days from the date of which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* C.F.R §802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision